

# DEP's Position on EPA's Wrongful Disapprovals of Maine's Water Quality Standards

*June 12, 2015*

## What are Water Quality Standards ("WQS")?

Under the Clean Water Act, there can be no unreasonable discharge of pollutants into "waters of the United States." Therefore, activities which may discharge pollutants into water are regulated. Water Quality Standards are the standards against which the reasonableness of the discharge is measured. Water Quality Standards consist of the designated uses of a waterbody (e.g. is it fishable, swimmable?) and the water quality criteria for such waters based on the uses.

## Brief history of DEP's authority to regulate WQS and EPA's failure to recognize Maine's authority

Approximately 35 years ago, Congress and the Maine Legislature established that the State has primary environmental regulatory authority and jurisdiction throughout the State of Maine, including within Indian territories. They did so through the Maine Implementing Act, 30 M.R.S.A. §§ 6201 *et seq.* ("MIA") and the Maine Indian Land Claims Settlement Act, 25 U.S.C. §§ 1721 *et seq.* ("MICA"), which are usually referred to as the "Settlement Acts". The authority of the State of Maine as primary regulator was confirmed by the First Circuit Court of Appeals in *Maine v. Johnson*, 498 F.3d 37 (1<sup>st</sup> Cir. 2007). Despite the establishment of Maine's clear authority, EPA has chosen to "take no action" to approve or disapprove water quality standards for waters in Indian territories for more than 10 years. This is in direct violation of the requirements in the Clean Water Act, which requires EPA to approve or disapprove the state's water quality standards within 90 days of submission by the state. This failure to act by EPA prompted the State of Maine to file suit against EPA in 2014.

In response to Maine's lawsuit against it and a directive by the Federal Court, EPA finally acted on approvals and disapprovals, many of which had been pending for more than 10, 20 or even 30 years. EPA's approvals and disapprovals were issued in a series of letters on February 2, 2015, March 16, 2015 and June 5, 2015.



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## What Do EPA's Letters Say?

In a letter dated February 2, 2015, the Regional Administrator of EPA Region I Curtis Spalding approved some of Maine's WQS, disapproved other longstanding WQS, and continued to fail to act on other WQS. The letter is ostensibly in response to Maine's request in court that EPA be ordered to follow the law. The letter is far-reaching, in its breadth and scope, and in its delivery. The letter proceeds to disapprove all water quality standards related to a variety of human health criteria for "all waters in Indian Lands," and specifically states that EPA has not approved any water quality standards for waters "in Indian lands." In supporting documentation, EPA acknowledges "uncertainties" over what constitutes waters associated with Indian Lands. This sets an expectation that Maine re-evaluate its WQS without knowing what changes are necessary to be made or what waters would be impacted. EPA also unilaterally created a new "designated use" for the waters ("sustenance fishing") without any public process pursuant to the Administrative Procedures Act.

Beyond the broad-reaching subject matter of the approvals and disapprovals enumerated in the letter, in a footnote of the letter, EPA states that it "intends to review and approve or disapprove all remaining Maine WQS that could apply to waters in Indian lands, such as dissolved oxygen criteria, definitions, antidegradation provisions, etc." (Footnote 3 on page 2.) Therefore, regardless of whether EPA had already approved a WQS, and regardless of how long and under what conditions permits based on the WQS have been issued, EPA stated its intention to revisit the very basis of DEP's delegated program.

After EPA issued the February 2, 2015 letter, indicating that it intended to issue additional approvals and disapprovals, the court imposed 2 deadlines on EPA: (1) issue a second set of approvals/disapprovals by March 16, 2015, and (2) issue any final approvals/disapprovals by May 15, 2015.

In response to a court-imposed deadline to complete other approvals/disapprovals of Maine's WQS, EPA Regional Administrator Curtis Spalding issued a second approval/disapproval letter on March 16, 2015. This second letter disapproves several additional WQS, and does not clarify the certainty of what constitutes waters associated with Indian Lands.

Despite the court-imposed deadline to issue any final approvals/disapprovals by May 15, 2015, EPA delayed issuance of its final approvals/disapprovals until June 5, 2015. Most of the approvals and disapprovals in this final letter reached back to before May 30, 2000. Many of the WQS disapproved by EPA in this letter had been in effect in Maine for 30 years. EPA revisited decades of work and regulation by the Department and retrospectively disapproved standards that have been considered protective of the citizens of the state of Maine for decades.

A complete list of WQS that EPA has listed as disapproved is located at the end of this fact sheet.



### What is DEP's position on the issue?

The State of Maine strongly disagrees with the letters. The standards have been wrongly disapproved by EPA. The standards are based on sound science and have been providing the Maine DEP with the important tools it needs to protect Maine's water quality for more than 30 years. Pursuant to Maine's responsibility under the Clean Water Act, we have adopted many revisions to our water quality standards over the years, and issued permits to dischargers that reflected those water quality standards. From the time when the standards and revisions were adopted, the Department has been issuing permits using the standards which EPA has determined are protective of the environment and the population of Maine. The standards have been used since that time in hundreds of permitting actions, all of which were reviewed by EPA. EPA never objected to those permits. To now indicate, more than 10, 20, or even 30 years later, that the standards are disapproved calls into question the reasonableness of EPA's actions.

The water quality standards developed and adopted by the Department are the result of the evaluation of sound science, review and response of public comments and input from EPA. Development of each standard requires extensive analysis by the Department and discussion of the proposed standards in an open and transparent forum. By contrast, the complete basis of EPA's offensively late decisions on Maine's WQS has not been shared with Maine. Although EPA provided a lengthy document, the document does not contain the scientific analyses or information necessary to form the basis of a disapproval. Information that was provided was based on supposition, and was not based on conclusive data. It is also unclear to what extent the decision is a result of undisclosed communications with tribes which are not shared with the State or any other affected party.

Maine is now required to react to a series of improper activities undertaken by EPA. EPA violated the provisions of the Clean Water Act by repeatedly failing to approve or disapprove Maine's WQS. Upon finally acting on some WQS, EPA created a new designated use for the waters in Maine without undergoing a public notice and comment process mandated by the Administrative Procedures Act. EPA wrongfully disapproved the very same WQS that EPA had previously approved as being protective of human health of Maine's population and the environment. Maine must consider all the actions (and lack of actions) undertaken by EPA to date. The Department is considering all legal and administrative options to address the wrongs which EPA has caused. In the meantime, to provide certainty and predictability for Maine's regulated community, the Department will continue to issue permits based on those standards, as they are fully protective of water quality.



## WQS that EPA Wrongly Disapproved<sup>1</sup>:

“For all waters in Indian Lands:

- The mercury human health criteria revision at 38 M.R.S. §420(1-B.A.(2)), submitted to EPA May 14, 2004;
- All human health criteria in DEP Rule Chapter 584, Surface Water Quality Criteria for Toxic Pollutants, Appendix A, submitted to EPA on January 11, 2006;
- Human health criteria revisions related to arsenic, acrolein, and phenol in DEP Rule Chapter 584 Surface Water Quality Criteria for Toxic Pollutants, Appendix A, and the last sentence in Ch. 584, § 5.C related to the fish consumption rate, submitted to EPA on January 14, 2013;
- The numeric bacteria criteria for the protection of primary contact recreation in Class B, C, GPA, SB and SC waters in 38 M.R.S. §§ 465(3.B) and (4.B), 465-A(1.B) and 465-B(2.B) and (3.B), submitted to EPA in 1985;
- The revisions to the numeric bacteria criteria for the protection of primary contact recreation in Class B and C waters in 38 M.R.S. § 465(3.B) and (4.B), submitted to EPA on January 11, 2006;
- The revisions made in L.D. 1450 at 38 M.R.S. §§ 465(3.B) and (4.B), and 465-B(2.B) and (3.B), which extended the applicability of the bacteria criteria for the protection of primary contact recreation in Class B, C, SB and SC waters to include bacteria of domestic animal origin, submitted to EPA on January 11, 2006;
- The revision made in L.D. 1778 at 38 M.R.S. § 465-A(1.B) which extended the applicability of the bacteria criteria for the protection of primary contact recreation in Class GPA waters to include bacteria of domestic animal origin, submitted to EPA on April 8, 2008;
- For fresh waters in Indian lands, the ammonia criteria for protection of aquatic life in fresh water in DEP Rule Chapter 584, Appendix A, submitted to EPA on January 11, 2006;
- The water quality standards revisions submitted to EPA on January 14, 2013, related to the 10<sup>-4</sup> cancer risk level to be used to calculate human health criteria for inorganic arsenic, at 38 M.R.S. §420(2.J), as set forth in P.L. 2011, Ch 194 (L.D. 515) “An Act To Review State Water Quality Standards”; the last sentence in Maine Rule Chapter 584, §4; and first sentence of Footnote aME in Table 1 of Appendix A of Ch. 584;
- 38 M.R.S. §420(2.A) – Exception for naturally occurring toxic substances from the requirement to regulate toxic substances at the levels recommended by EPA, as it applies to human health criteria;
- 38 M.R.S. §451 – Mixing zone policy;
- 38 M.R.S. §464(4.A.(5)) – pH criterion for freshwaters;
- 38 M.R.S. §464(4.C)) – Natural conditions clause, as it applies to human health criteria;

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<sup>1</sup> EPA characterized its approvals as being “in Inland Lands,” “all waters outside of waters in Indian Lands,” or “all waters throughout Maine, including in Indian Lands.” These characterizations do not recognize the well-settled law that the State of Maine is the primary regulatory authority for all waters of the state. For the purpose of listing the disapproved standards, the exact language used by EPA is provided in the list. DEP does not endorse or agree with the characterizations.



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- 38 M.R.S. §465(1.B), §465(2.B) and §465-B(1.B) – Narrative criteria for bacteria in Class AA, A, and SA waters, respectively; and
- DEP Rule Chapter 582(5) – Tidal temperature criteria.

“For all waters throughout Maine, including in Indian Lands:

- The revisions made in L.D. 1304 at 38 M.R.S. §464(4.A(3)(a)), and §465((3.C.(1)) and (4.C), related to certain pesticide discharges, submitted to EPA on January 11, 2006;
- The phenol criteria for the protection of human health consumption of water plus organisms, in DEP Rule Chapter 584, Appendix A, submitted to EPA on January 14, 2013;
- The revision made in L.D. 1430 at 38 M.R.S. §464(4.A(3)(b)), related to certain pesticide discharges to tributaries of GPA waters, submitted to EPA on February 27, 2014;
- 38 M.R.S. §363-D – Waiver or modification of protection and improvement laws;
- 38 M.R.S. §465(2.B) – Numeric criteria for dissolved oxygen in Class A Waters; and
- 38 M.R.S. §465(1.C.(1)) and §465-B(1.C.(1)) – Exceptions to prohibitions on discharges to Class AA waters and Class SA waters, respectively.

“For all waters outside of waters in Indian Lands:

- The reclassification of a 0.3 mile segment of Long Creek that flows through Westbrook from Class B to Class C, submitted to EPA on December 7, 2009.”

